United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

377

IN THE

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 21769

Governor Lover

v.

United States of America

Appeal from the United States District Court for the District of Columbia

---

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 22 1968

Nathan J. Paulson
CLERK

Fred S. Gilbert, Jr.
Court-appointed counsel for
Appellant by the U. S. Court
of Appeals for the District of
Columbia Circuit
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

STATEMENT OF QUESTIONS PRESENTED

1. The question is whether the trial judge erred in denying the Appellant's motion to suppress an in-court identification by an eye-witness to the crime when the circumstances of the pretrial identification procedures used by the police were so unnecessarily suggestive and conducive to misidentification as to deny the Appellant due process of law.

2. The question is whether the search of the Appellant's room by the police without a warrant and the subsequent admission of evidence resulting from that search violated the Appellant's right under the fourth Amendment to the Constitution of the United States to be secure against unreasonable searches and seizures.

INDEX

TABLE OF CASES

---

* Cases or authorities chiefly relied on are marked by an asterisk.

In The

UNITED STATES COURT OF APPEAL

For the District of Columbia Circuit

No. 21769

Govenor Lover, Appellant

v.

United States of America, Appellee

Appeal from the United States District Court

for the District of Columbia

APPELLANT'S BRIEF

JURISDICTIONAL STATEMENT

The Court has jurisdiction of this matter pursuant to 28 U.S.C. 1291. Appellant was charged with two counts (1 and 3) of housebreaking in violation of D.C. Code, Section 22-1801, one count (2) of grand larceny in violation of D.C. Code, Section 22-2201 and one count (4) of petit larceny in violation of D. C. Code, Section 22-2202 by a grand jury on or about June 26, 1967, and was convicted of the said charges after a trial by jury on January 31, 1968. On March 1,

1968, Appellant was sentenced to a term of from two to six years on counts 1, 2, and 3 and to a term of one year on count 4, said sentences to run concurrently. On March 5, 1968, Appellant was authorized by the trial judge to proceed on appeal without prepayment of costs.

STATEMENT OF THE CASE

I

The In-Court Identification

Clarence Pernell Fields testified that on April 20, 1967, he was sitting near his living room window at 4606 Iowa Avenue, N.W., when he observed a man come down the street and enter the house next door. He further testified that, about five minutes later, he observed two men come out of this house carrying various large articles, which they loaded into a 1959 Oldsmobile automobile that had been backed down the street to meet them. These two men, as well as a small boy who had been playing in Field's yard, got into the automobile and drove off. Fields did not see the person driving the automobile; however, he did make a record of the license plate number.[1/]

When the police arrived on the scene a short time later, Fields described one of the suspects (allegedly the Appellant) as a negro male about 29 to 35 years old, about 5'8" to 5'10" tall, and weighing between 170 and 180 pounds. Appellant actually weighed 148 pounds and was 5'8" tall.[3/]

1/ Trial Transcript, p. 29 - 32 and p. 64 - 65.

2/ Trial Transcript, p. 53 and p. 70.

3/ Trial Transcript, p. 133.

That same day, the police were able to trace the license plates of the automobile to a Mrs. Lillian Coates wo ran a rooming house at 145 Tennessee Avenue, N.E. She informed the police that she had loaned her car to a man who roomed in her house, and his girl friend, to take her son, Reco, shopping. Being unable to obtain the full name of the roomer and his girl friend from Mrs. Coates or her son, Reco, the police asked to see the Appellant's room. Upon going upstairs and finding it locked, they had Reco climb through the transom, which was partially open, and unlock the door. They entered the room, and from some correspondence lying on the bed, they obtained the names of the Appellant and one Ida Mae Watson.[4/]

On April 24, 1967, four days after the alleged crime occurred, Fields was taken down to the Police Station where he was shown a picture of each of three possible suspects. Two of the pictures were those of males, and one was that of a female.[5/] Fields identified the picture of the Appellant as one of the men he had seen at the scene of the crime.[6/] When asked to describe the picture of the other suspect, Fields stated that it resembled the Appellant's picture in complexion and size, however, the other suspect appeared to be about 10 years older than the Appellant and had a differently shaped head.[7/]

The Appellant was arrested and presented[8/] on May 22, 1967, nearly a month after the photographic identification. At the time of the presentment in the

---

4/ Trial Transcript, p. 54 - 55.

5/ Trial counsel for Appellant hypothesized that one of the pictures was that of Ida Mae Watson, while the other was that of the other suspect to the crime.

6/ Trial Transcript, p. 39.

7/ Trial Transcript, p. 39.

8/ Error in Trial Transcript with respect to the date Fields identified the Appellant at the Court of General Sessions. The actual date was May 22, 1967. (Preliminary Hearing Transcript, p. 8).

Court of General Sessions, Fields was asked to sit in the back of the court room with Detective Melvin L. Humphrey of the Metropolitan Police Force. Just as Appellant was brought into the court room, Detective Humphrey turned to Fields and asked if he saw the man who committed the crime. Fields looked up, saw the Appellant coming through the door and identified him to the detective.[9]

The Appellant was brought to trial on January 29, 1968. Before Fields was called to the stand, Appellant's counsel made a motion to suppress the in-court identification testimony that the government proposed to elicit from Fields, on the grounds that such testimony was "tainted" and so prejudicial as to violate the Appellant's Fifth Amendment right of due process, and that it was the result of an illegal search and seizure.[10]

The trial judge excused the jury from the court and allowed a hearing on the motion. At that hearing the above facts were brought out. Furthermore, the Assistant District Attorney asked Fields if he were able to identify the person who was at the scene of the crime. Fields then pointed to the Appellant and said: "The person that I saw from all resemblance that I saw, it was this guy, but I am positive it is him but I am not sure."[11] Fields was asked several times what he meant by "positive but not sure" and his reply was that: "That is why I said that I couldn't be certain because I never got a chance to see his whole face."[12] Fields further testified that, while he viewed the entire scene for about 15 minutes, he only noticed the men he saw for "about 20 or 30 seconds."[13]

9/ Trial Transcript, p. 36 - 39.

10/ Trial Transcript, pp. 27, 47 and 60 - 63.

11/ Trial Transcript, p. 32.

12/ Trial Transcript, p. 44

13/ Trial Transcript, p. 35.

The trial judge then heard arguments by counsel as to whether Appellant's right of due process had been violated, and, at the conclusion of these arguments, overruled Appellant's motion to suppress the in-court identification.

The jury was then called back into the court room and Fields was called to take the stand. Under direct examination by the government, Fields was asked whether he would be able to recognize either of the men he had seen at the time of the crime. Fields replied:

> "That is the one that is sitting at the table with the brown collar. (pointing to defendant)" 14/

On cross-examination the following testimony was brought out:

> "By Mr. Cannon [Appellant's counsel]:
>
> Q. Now, Mr. Fields, a few moments ago you testified on direct examination that the defendant Governor Lover seated here today in the court room was in fact the man you saw on the day in question, is that correct?
>
> A. True.
>
> Q. You are certain of that aren't you?
>
> A. I am positive but not certain.
>
> Q. Perhaps you could draw the distinction for us between certain and positive?
>
> A. Well, from the picture that I saw --" 15/

Subsequently, it was brought out that, at the preliminary hearing, Fields testified as follows:

14/ Trial Transcript, p. 67

15/ Trial Transcript, p. 76 - 77.

"Q. Reading from the transcript of the preliminary hearing of May 23, page 16:

'Q. Of the people you saw that occasion do you see anyone meeting the description you gave the police in the court room now?

'A. Yes, someone looked -- their face -- not the face, but height and size and hair, I saw part of his mustache. I didn't see the face completely but as near to that description as I have seen yet.'

"Line 23:

'Q. But you are not 100% positive this is the man, is that correct?

'A. No, because I never saw his face turned completely toward me, either aside or the back of him.'" 16/

In response to a question as to whether the material just quoted above was a correct transcript of what he said at the preliminary hearing, Fields stated:

"A. I said I was positive but I wasn't certain because of the fact that looking at someone through glass or even sometime you don't see all of the same picture, I mean it may make the picture shape a little different." 17/

He then stated affirmatively that this was a correct copy of his testimony on that day.

16/ Trial Transcript, p. 80 - 81.

17/ Trial Transcript, p. 81.

II.

Circumstantial Evidence

The government also attempted to show that Appellant was guilty through the following chain of circumstantial evidence: (1) The Assistant United States Attorney attempted to establish the presence of the car at the scene of the crime through the testimony of Fields. He also used his testimony as to the license plate number to establish ownership of the car in Mrs. Lillian Coates. (2) He used Mrs. Coates' testimony in an attempt to establish the fact that she had lent her car to the Appellant and his girl friend to take her (Mrs. Coates') young son, Reco, out shopping to purchase a pair of pants. (3) He used the testimony of the boy, Reco, in an attempt to establish that the Appellant was in fact at the scene of the crime.

On direct examination, the Appellant testified that his girl friend borrowed Mrs. Coates' car to take the boy, Reco, to buy a pair of pants. He further testified that rather than driving downtown with them, he got out of the car at 8th and K St., S.E., had breakfast at a local restaurant, and spent the afternoon in a pool room. and in a restaurant, both of which were nearby. 18/

STATUTES AND RULES INVOLVED

The relevant parts of statutes and rules involved in the instant appeal are found in the Appendix.

18/ Trial Transcript, p. 131 - 133.

STATEMENT OF POINTS

1. The circumstances of the identification procedure were so unduly prejudicial as to taint fatally the evidence offered against the Appellant and his subsequent conviction. The trial court erred in denying Appellant's motion to suppress the in-court identification.

With respect to this point, Appellant desires the Court to read the following pages of the reporter's transcript:

Trial Transcript, p. 28 - 63, inclusive.

2. The search of Appellant's private room without a warrant was violative of Appellant's Fourth Amendment right to be secure against illegal searches and seizures. The trial court erred in denying Appellant's motion to suppress the evidence resulting from that search.

With respect to this point Appellant desires the Court to read the following pages of the transcript:

Trial Transcript, p. 34, 39, 54, 55, 56.

SUMMARY OF ARGUMENT

I. THE ILLEGAL IDENTIFICATION

The Appellant was denied due process of law when the police unjustifiably failed to show the eyewitness to the crime photographs in a number great enough to be sufficient for him to make a fair identification, and when they unjustifiably failed to hold a lineup after the Appellant's arrest. The failure of police to employ proper procedures must be viewed in the light of the insubstantial initial observation by eye-witness of the suspect.

The trial court erred in denying Appellant's motion to suppress the in-court identification.

II. THE ILLEGAL SEARCH AND SEIZURE

The police conducted a search of the Appellant's private room without a warrant and without the consent of Appellant. This search violated the Fourth Amendment right of the Appellant to be secure against unreasonable searches and seizures. As a result of the exploitation of this illegal search, evidence was obtained leading to the identification and arrest of the Appellant.

The trial court erred in denying Appellant's motion to suppress the evidence resulting from the illegal search.

ARGUMENT

I. APPELLANT WAS DENIED DUE PROCESS OF LAW BY REASON OF THE PRETRIAL IDENTIFICATION PROCEDURE EMPLOYED

The necessity of various pretrial police investigatory procedures such as a photographic identification and lineup is well known. However, equally well known, and recognized by the courts, is the inherent danger that may accompany these procedures, unless adequate safeguards are established to prevent the police from infringing upon the rights of the suspect, in their preoccupation with getting sufficient proof.

In United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967), the Supreme Court has recognized the suggestive effects that an improperly conducted lineup can have on an eye-witness to crime. To alleviate this possible danger, the Court held that the lineup is a "critical stage of the

prosecution" and that the accused is entitled to the assistance of counsel to insure his right to due process of law.

In Stovall v. Denno, 388 U.S. 293 (1967), a companion case to Wade and Gilbert, the court announced that the right to the presence of counsel at the lineup was not retroactive. Since Appellant's arrest and initial identification occured just prior to these decisions, no argument is advanced at this time that Appellant was deprived of his right under the Sixth Amendment to the Constitution to the assistance of counsel.[19] However, it is a fact that Appellant did not have the assistance of counsel at that crucial time.

However, Stoval did clearly announce that the circumstances of the identification may be ". . . so unnecessarily suggestive and conducive to irreparable mistaken identification that [the accused is] denied due process of law", and that this issue may be raised despite the non-retroactive requirement of Wade and Gilbert.[20] The Supreme Court further stated that ". . . a claimed violation of due process of law in the conduct of the confrontation depends on the totality of the circumstances surrounding it . . ."[21]

In Wade, the Supreme Court ennumerated the factors that should be considered in evaluating whether the in-court identification was the result of exploitation of the

---

19/ Accord, Wright v. United States, No. 20,153, D.C. Cir. (Decided Jan. 31, 1968) where this Court "declined to apply, in the exercise of [its] supervisory authority in this jurisdiction, the Wade-Gilbert principle retroactively." Id., at p. 5 of the slip opinion.

20/ 388 U.S. at 302. See, also, Wright v. United States, No. 20,153, D. C. Cir., Jan. 31, 1968.

21/ 388 U.S. at 302.

primary illegality or whether it came about ". . . by means sufficiently distinguishable to be purged of the primary taint." 22/ These factors are:

> ". . . [T]he prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, . . . the identification by picture of the defendant prior to the lineup, . . . and the lapse of time between the alleged act and the lineup identification." 23/

The Supreme Court in the recent case of Simmons v. United States, 36 U.S.L. Week 4227 (U.S., Mar. 18, 1968), affirming a conviction of a bank robber allegedly based on a tainted identification, spelled out the following additional factors that must be considered in determining whether a particular photographic idnetification is unduly prejudicial:

> ". . . A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions . . . This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw . . . The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime." 24/

A. The Photographic Identification

In the instant case, the circumstances show a climate of impermissible suggestivity and indicate a very high probability that the procedure utilized might have led to a misidentification of the Appellant. The eye-witness, Fields,

---

22/ 388 U.S. at 241.

23/ Id. at 241.

24/ 36 U.S.L. Week at 4228.

testified that he only "noticed the felon for about 20 or 30 seconds"[25] and that his vision was optically distorted by the glass in his living room window.[26] The chance of error in such a scant viewing is compounded by the fact that the eye-witness never "got a chance to see his whole face."[27] The police delayed four days in displaying the photographs to Fields, even though they had the names and pictures of possible suspects (i.e., the Appellant) within hours of the occurrence of the crime.

When Fields was finally asked to make a photographic identification he was shown only three photographs -- one each of two males and one of a female. Effectively, Fields was only given a choice between two photographs. Examining this "choice" closely, one finds tht photograph of the Appellant, who evidently resembled the person Fields saw so fleetingly and a photograph of another man who appeared to be 10 years older and had a differently shaped head. These three photographs, coupled with the fact that Fields observed that there were three people at the scene of the larceny, tended to suggest strongly to Fields that the police suspected that these three individuals committed the crime. This is especially true, since Fields had never told the police he had seen a woman. These circumstances must have inevitably raised in Fields' mind a question as to why the police were

---

25/ "Q. How long a period of time, if you can tell us, was he in your view? Was it two seconds, one minute, or five minutes, or what?

"A. Actually I wasn't really noticing him that much until after the second time they came out and then when they came out the second time I guess it was about, I would say about 20 or 30 seconds". (Trial Transcript, p.35).

26/ "A. I said I was positive but I wasn't certain because of the fact that looking at someone through glass or even sometime you don't see all of the same picture, I mean it may make the picture shape a little differont." (Trial Transcript, p. 81).

27/ Trial Transcript, p. 32.

showing him the picture of a woman. The obvious answer to this was that the police suspected a woman -- and not just a woman, but the particular woman in the picture. Being, thus, subtly informed that the police suspected the woman whose picture was shown, Fields was, also, induced to believe that the police suspected the men in the pictures.

The possible misidentification is further highlighted by the fact that Fields' description to the police of the man he saw was of a Negro, age 35, who was five feet, eight to ten inches, in height, weighing between 170 and 180 pounds. The Appellant actually weighed only 148 pounds at the time of the crime, some 20 to 30 pounds less than the description. On a man 5'8" tall (the height of the Appellant), this is a significant difference.

The circumstances of the Appellant's photographic identification are clearly distinguishable from those in the Simmons case where:

> ". . . The robbery took place in the afternoon in a well-lighted bank . . . Five bank employees had been able to see the robber later identified . . . for periods ranging up to five minutes. Those witnesses were shown the photographs only a day later, while their memories were still fresh. At least six photographs were displayed to each witness . . . ." 28/

Furthermore, the Supreme Court in Simmons laid considerable emphasis on the fact that "these initial identifications were confirmed by all five witnesses in subsoquent viewing of photographs and at trial, where . . . [n]otwithstanding cross examination, none of the witnesses displayed any doubt . . . ." 29/ At best, Fields could only say: ". . . I am positive it is him but I am not sure." 30/

28/ 36 U.S.L. Week 4227, 4229.

29/ Ibid.

30/ Trial Transcript, p. 32.

Looking to the totality of circumstances, it is evident that the standard established in the Simmons case has been met. That is, ". . . the photographic procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[31] There is more than a reasonable possibility that the in-court identification here, based on such a tainted photographic identification, contributed materially to the conviction.[32] The trial judge clearly erred in denying the Appellant's motion to suppress the in-court identification.

B. The Identification At the Time of Presentment

Contemporaneous with the Appellant's entrance into the court room for presentment, Detective Humphrey asked the eye-witness, Fields, whether he saw the man who committed the crime. When Fields pointed to the Appellant standing in the doorway alone or, probably, accompanied by or handcuffed to a marshall (the record does not indicate), the Appellant was subjected to a one man lineup.

The insubstantial initial observation, the identification by photograph prior to the "lineup",[33] and the delay of approximately one month between the alleged crime and the lineup,[34] and the other circumstances described above, present the dangers and

---

31/ 36 U.S.L. Week at 4229.

32/ Chapman v. California, 386 U.S. 18 (1967).

33/ The Supreme Court of California in People v. Evans said:

> "It can hardly be said to be in accord with the principles of justice and fair play to show a complaining witness the picture of one man and then take her into a room where that man is the only occupant." 39 Cal. 2d 244, 246 P.2d 636, 642 (1952).

34/ This Court in Wise v. United States, ____U.S. App. D.C.____, 383 F.2d 206 (1967) stated that ". . . circumstances of fresh identification, [are] elements that if anything promote fairness, by assuring reliability . . ." Id. at 209.

fundamental unfairness that the Supreme Court was addressing itself to in Wade, Gilbert, and Stoval.

The circumstances of the Appellant's identification present the "concrete record" of which this Court spoke in Wright v. United States, Docket No. 20,153, D.C. Cir., Decided, Jan. 31, 1968, when it reserved the question discussed by Chief Judge Bazelon in his dissenting opinion. Chief Judge Bazelon stated:

> "I believe that due process is violated whenever the police unjustifiably fail to hold a lineup. Since mistaken identifications are probably the greatest cause of erroneous convictions, we must require the fairest identification procedures available under the circumstances. With stakes so high, due process does not permit second best." 35/

The entire record in this case reflects poor police methods. More than that, it reflects a tendency on the part of the police to forego procedure compatible with due process where they believe a particular suspect is guilty. The right to due process of law is not proportional to the police's belief of guilt. In this case, the police unjustifiably failed to display to the eye-witness photographs sufficient in number for him to make a fair identification. 36/ They unjustifiably failed to obtain a search warrant, when they went through the Appellant's room. And, finally, they unjustifiably failed to hold a lineup, after the suspect had been arrested and about a month had elapsed since the witness had observed and described the robbery.

> "The only remedy that will effectively curb these practices is to impose an exclusionary rule on the testimony of a witness who identified the accused

---

35/ Wright v. United States, supra at p. 10 of slip opinion.

36/ The Supreme Court in footnote 6 of the Simmons case suggests that ". . . it probably would have been preferable for the witnesses to have been shown more than six snapshots . . . ." 36 U.S.L. Week at 4229.

> in any identification procedure . . . which was conducted so as to have the reasonable possibility of producing unreliable results. This rule will impose an affirmative duty on the police to carry out their procedures in a manner compatible with due process of law." 37/

II. IMPROPER ADMISSION OF EVIDENCE OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH

The Fourth Amendment to the Constitution of the United States guarantees that citizens shall be secure against unreasonable searches and seizures. The sanction against violation of this guarantee is the suppression of evidence secured as a result of an unlawful search, as provided in Rule 41 (e), Federal Rules of Criminal Procedure (Appendix, p. A-1), including the products of the invasion and the indirect products as well. "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it . . . ." 38/ In applying this exclusionary rule, the Supreme Court stated in Wong Sun v. United States:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that

---

37/ Haworth, C.R., the Right to Counsel During Police Identification Procedures, 45 Texas L. Rev. 510, 514 - 5 (1967).

38/ Silverthorne Lumber Company v. United States, 251 U.S. 385, 392 (1920)

> illegality or instead by means sufficiently distinguishable to be purged of the primary taint'." 39/

This test must now be applied to the search of Appellant's room.

A. The Primary Illegality

The primary illegality here was the search of Appellant's room by the police without a search warrant.

> "[The] guarantee of protection against unreasonable searches and seizures extends to the innocent and the guilty alike. It marks the right of privacy as one of the unique values of our civilization. . . ." 40/

It is well established that the police are prohibited from searching a person's private premises, unless they have a search warrant issued by a magistrate upon probable cause 41/ or unless they search incident to a lawful arrest. 42/

> "The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." 43/

There must be compelling reasons to justify the absence of a search warrant, and in exceptional circumstances it may be contended that a magistrate's

---

39/ 371 U.S. 471, 487-8 (1963).

40/ McDonald v. United States, 335 U.S. 451, 453 (1948).

41/ McDonald v. United States, 335 U.S. 451 (1948); Weeks v. United States, 232 U.S. 383 (1914); United States v. Jeffers, 342 U.S. 48 (1951).

42/ Agnello v. United States, 269 U.S. 20 (1925); United States v. Rabinowitz, 339 U.S. 56 (1950).

43/ McDonald v. United States, 335 U.S. at 455-6.

warrant for a search may be dispensed with. If a suspect is fleeing or likely to take flight, if there is a question of violence, if the search is of a moving vehicle as opposed to permanent premises, if the evidence or contraband is threatened with removal or destruction, or will perish from the delay in getting a warrant, such a search may possibly be justified.[44/]

It is obvious that none of these exigent circumstances was present here. Therefore, the police should have obtained a search warrant before searching Appellant's room in his absence and without his permission. The police knew that the Appellant was not present, so there was no question of possible flight or removal of evidence. Proper police procedure would have been to leave an officer guarding the room, while a warrant was obtained, as was suggested by the court in Johnson v. United States, 333 U.S. 10 (1948), where the Court also said that:

> "The inconvenience of the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate . . .[a]re never very convincing reasons . . .." [45/]

Expediency is no justification for abridging a basic constitutional right of any citizen, including the Appellant.

B. Exploitation of the Primary Illegality

During the illegal search of Appellant's room, the police discovered a letter on the bed. As a result of this, they learned the full name of the Appellant. Having thus gained knowledge of his name, they then secured a picture from the police files, which Mrs. Coates identified as a photograph of the Appellant. This

---

44/ Johnson v. United States, 333 U.S. 10 (1948); Jeffers v. United States, 342 U.S. 48 (1951).

45/ Johnson v. United States, 333 U.S. at 15.

photograph, together with one photograph each of a woman and another man, was then used in the identification procedure in which Mr. Fields, an eye-witness, identified the Appellant. Therefore, this identification was the direct fruit of the illegal search, arrived at by exploitation of that primary illegality.

This is not a case where the prosecution learned of the evidence "from an independent source",[46] nor a case where the connection between the illegal, unconstitutional conduct of the police and the discovery of the evidence had become so attenuated as to dissipate the taint.[47] It is evident that the identification made by Mr. Fields from the photograph was the direct result of exploitation of the illegal search.[48] Therefore, under the exclusionary rule established in Wong Sun, his identification testimony should not have been admitted in evidence.

The fact that the police could have discovered the last name of the accused in another manner does not justify this invasion of the Appellant's constitutional right. The fact is, they did not use other available means; and the method they did use violated the Appellant's Fourth Amendment right against unreasonable searches. In United States v. Paroutian, 299 F.2d 486 (2d Cir., 1962), the court, in deciding that evidence seized in a third search was tainted by two previous illegal searches without warrants, stated (p. 489):

> ". . . [A] showing that the government had sufficient independent information available so that in the normal course of events it might have discovered the questioned evidence without an illegal search

---

46/ Silverthorne Lumber Company v. United States, 251 U.S. 385, 392 (1920)

47/ Wong Sun v. United States, 371 U.S. 471 (1963).

48/ Ibid.

> cannot excuse the illegality or cure a tainted matter. Such a rule would relax the protection of the right of privacy in the very cases in which, by the government's own admission, there is no reason for an unlawful search." 49/

Just as the identification made by Mr. Fields is the result of exploitation of the illegal search and should be excluded, so the logical extension of this rule would be the exclusion of the Appellant, himself. If an illegal search of the Appellant's room had resulted in the discovery of narcotics, and had the Appellant been arrested and charged with possession of narcotics, the court would have been required to suppress the introduction of that evidence at the trial. Without such evidence there would have been no basis for a conviction, assuming "possession" to be an essential element of the crime. As a result of the illegal search in the instant case, the Appellant's full name was discovered, an identification was made, and, finally, the Appellant was arrested. The arrest was a direct result of the illegal search. Thus, as a fruit of the primary illegality, the Appellant's physical presence should be excluded from evidence, just as a package of narcotics would have been, had it been found as a result of an illegal search.

CONCLUSION

Wherefore, for the foregoing reasons, Appellant requests this Court to reverse the verdict of the trial court below or, in the alternative, to remand the case for a new trial, with instructions to exclude the in-court identification by the witness Charles Percell Fields, all evidence relating to the pre-trial identification,

---

49/ 299 F.2d at 489.

and all evidence obtained as a result of the illegal search of the Appellant's room.

Respectfully submitted,

Fred S. Gilbert, Jr.
Court appointed counsel
for Appellant
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

May 22, 1968

STATUTES AND RULES INVOLVED

APPENDIX

I. CONSTITUTION OF THE UNITED STATES

Amendment IV -- Searches and Seizures

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V -- Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

> No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II. FEDERAL RULES OF CRIMINAL PROCEDURE

41(e) -- Motion for Return of Property and to Suppress Evidence

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, and (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive

evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

III. D.C. CODE, TITLE 22 (1967)

§22-1801. Definition and Penalty

Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof, or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years. (Mar. 3, 1901, 31 Strat. 1323, ch. 854, §823.)

§22-2201. Grand Larceny

Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years. (Mar. 3, 1901, 31 Stat. 1324, ch. 854, §826; Aug. 12, 1937, 50 Stat. 628, ch. 599; June 29, 1953, 67 Stat. 99, ch. 159, §215(a).)

§22-2202. Petit Larceny -- Order of Restitution

Whoever shall feloniously take and carry away any property of value of less than $100, including things savoring of the realty, shall be fined not more than $200 or be imprisoned for not more than one year, or both And in all convictions for larceny, either grand or petit, the trial justice may, in his sound discretion, order restitution to be made of the value of the money or property shown to have been stolen by the defendant and made way with or otherwise disposed of and not recovered. (Mar. 3, 1901, 31 Stat. 1324, ch. 854, §827; June 30, 1902, 32 Stat. 535, ch. 1329; August 12, 1937, 50 Stat. 628, ch. 599; June 29, 1953, 67 Stat. 99, ch. 159, §215(c).)

CERTIFICATE OF SERVICE

I, Fred S. Gilbert, Jr., hereby certify that the foregoing "Brief for Appellant" was served this 22nd Day of May, 1968, by mailing true copies thereof postage prepaid, to the United States Attorney, United States Courthouse, Washington, D.C. 20001.

Fred. S. Gilbert, Jr.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,769

GOVERNOR LOVER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit
FILED JUL 1 - 1968
Nathan J. Paulson
CLERK

DAVID C. BELL,
United States Attorney.

FRANK Q. NEBEKER,
GEOFFREY M. ALBERT,
JOHN H. TERRELL,
Assistant United States Attorneys.

HENRY E. GEORGBRATH,
Attorney, Department of Justice.

Cr. No. 778-67

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Whether the District Court properly denied appellant's motion to suppress Fields' in-court identification on *Stovall* grounds.

2) Whether the District Court properly rejected appellant's contention that Fields' photographic identification of appellant which in turn led to Fields' in-court identification was the fruit of Officer Humphrey's alleged illegal entry into appellant's room, where there was no testimony to connect Officer Humphrey's entry into appellant's room with Fields' subsequent photographic identification of appellant and where, in any event, appellant had abandoned the room in which Officer Humphrey made his entry.

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by an asterisk.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,769

GOVERNOR LOVER, ANNELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Summary of Proceedings

Appellant was charged by indictment with two counts of housebreaking (22 D.C. Code § 1801), one count of grand larceny (22 D.C. Code § 2201), and one count of petit larceny (22 D.C. Code § 2202). The indictment in substance charged that appellant on April 20, 1967 unlawfully entered the apartments of Nathaniel McGruder and Joyce M. Pertiller and stole a television, stereo, and blanket belonging to Nathaniel McGruder and a televi-

sion and radio belonging to Miss Pertiller. On July 7, 1967, appellant entered a plea of not guilty on all counts. On January 28, 1968, trial commenced before the Honorable John J. Sirica and a jury and terminated on January 31, 1968, the jury returning a verdict of guilty on all counts. On March 1, 1968, appellant was sentenced to three concurrent terms of from two (2) to six (6) years on counts 1 through 3 and a term of one (1) year on count 4 to run concurrently with the terms imposed on the first three counts.

The Trial

On April 20, 1967, Nathaniel McGruder resided with his wife and child at 4608 Iowa Avenue, N.W., Apartment 1, in the District of Columbia (Tr. 3-4). At about 12:30 p.m. on that day he was called by telephone at his place of work by Clarence Fields, his next door neighbor, and after talking with Fields rushed home (Tr. 4). Upon arriving at his residence, he observed that the front door was open and that a television, stereo,[1] and a blanket were missing (Tr. 4). McGruder described the television as "brand new" and stated that he had paid between $400 and $500 for it (Tr. 5-6). He then identified Government's Exhibit 1 as the stereo that was taken from his residence, estimating that it was about one year old and stating that he paid $300 for it. (Tr. 6-7.)

On April 20, 1968, Joyce Pertiller resided at 4608 Iowa Avenue, N.W., Apartment 2 (Tr. 11). She arrived home at about 12:30 p.m. and discovered that her apartment had been broken into and that a television and radio had been taken (Tr. 12). She stated that the television was three years old, that she had paid $335 for it, and estimated that it was worth $200 on the day it was taken (Tr. 13). She then identified Government's Exhibit 2 as the radio taken from her apartment, but, because it was a gift, declined to estimate its value (Tr. 13-14).

---

[1] It appears that the witnesses used the terms "hi fi" and "stereo" in referring to the same item. To be consistent, we shall refer to this item as a stereo.

Following McGruder's and Miss Pertiller's testimony, the court excused the jury and heard testimony and argument on appellant's motion to suppress the identification testimony of the Government's next witness, Clarence Fields. Fields resided at 4606 Iowa Avenue, next door to 4608, where the housebreaking occurred (Tr. 28). At approximately 11:30 a.m. on April 20, 1967, as he was sitting by his living room window, he saw at least one man enter the premises next door and emerge five or ten minutes later with another man. Both men were carrying articles of some kind—one item was wrapped in a blue blanket—which they put in the trunk of an automobile parked in front of the premises (Tr. 29). At the same time, Fields noticed a boy, who he estimated was about six or seven years of age, playing in his yard (Tr. 29, 30). He described the car in which the men loaded the articles as a 1959 Oldsmobile, two-door sedan, and took down its license number (Tr. 30). He observed the two men and the child get into the automobile, which was occupied by a driver, and depart (Tr. 30). He identified appellant as one of the men he saw enter and emerge from the premises next door, stating: "The person that I saw from all resemblance that I saw, it was this guy but I am positive it is him but I am not sure" (Tr. 32). He said he described the man he identified as appellant to the police as approximately 5'8" to 5'10" tall and between 175 and 180 pounds (Tr. 33). He said that it was a light, sunny day and that he observed this man from a distance of approximately 14 feet for about 20 or 30 seconds (Tr. 35, 42). He acknowledged that he did not see the housebreaker's entire face, just a side view, but he remembered that the man he observed wore a blue jacket and gray trousers (Tr. 43).

Four days after the offense, Fields was called down to the police station where he viewed three photographs; two depicting men, one depicting a woman (Tr. 34, 39). On cross-examination, referring to the circumstances surrounding his identification by photograph, Fields testified as follows (Tr. 39-40):

Q With the exclusion of the picture of the defendant was the other man a Negro?

A Yes.

Q Did he look similar to this defendant?

A Yes.

Q In what way?

A They was about the same complexion and both of them looked to be approximately the same size and both of them wore their hair cut close and both of them had a dark mustache.

Q What made you pick this defendant instead of the other man?

A What made me pick him? Because of the head of this man is different from the head of the other man. The heads aren't shaped the same.

Q Were they approximately the same age?

A I would say that the other picture was older.

* * * *

Q How much older?

A Maybe ten years.

Fields further testified that some time in June or July he identified appellant at the Court of General Sessions (Tr. 35). He said he made his identification as appellant's case was called and appellant was brought into the courtroom (Tr. 37-38).

Officer Melvin L. Humphrey also testified out of the presence of the jury. He related that he was the officer who obtained a description of the housebreaker from Fields (Tr. 52-53). He said Fields described the housebreaker as a "Negro male, about 29 to 35 years, about 5'8" to 5'10" . . . weighed between 170 and 180 pounds, dark skin . . . his pants were gray and [he wore] . . . a dark short jacket" (Tr. 53).

During the course of the hearing on the motion to suppress, another issue, in addition to the *Stovall-Simmons* claim, arose as a result of Officer Humphrey's testimony. Officer Humphrey testified that in his investigation of the housebreaking he went to the home belonging to Mrs.

Lillian Coates (Tr. 54).[2] Mrs. Coates rented a room to appellant. She told Officer Humphrey that she loaned her car to appellant and his girlfriend on the morning of April 20th. As she was being interviewed by Officer Humphrey, Mrs. Coates received a telephone call from a person she identified as Ida—appellant's girlfriend—and told Humphrey she was asked by Ida if the police were there, and that she answered yes. Following the telephone conversation between Mrs. Coates and Ida, Officer Humphrey inquired where appellant's room was located and, directed there, tried unsuccessfully to enter. Mrs. Coates' son, Reco, offered to get into the room through a transom which he did. Once in appellant's room, Reco opened the door. Officer Humphrey entered and found lying on the bed a letter which contained the name Ida Watson. Later that day Mrs. Coates identified Ida Watson and appellant by photograph as the roomer and his girlfriend to whom she loaned her car on the morning of April 20th. (Tr. 54-55.) Relying on Officer Humphrey's testimony, appellant moved to suppress Fields' identification testimony on the ground that Fields' identification of appellant by photograph resulted from an illegal search. The Government countered that the names of appellant and his girlfriend were known to Mrs. Coates and her son and that the letter simply corroborated what Officer Humphrey already knew. The Government further represented that nothing flowing from the search would be used at trial (Tr. 62). At the conclusion of the hearing, the court rejected appellant's arguments based on *Stovall* and the "fruit of the poisonous tree" and held that the Government could introduce Fields' identification testimony (Tr. 63).

Before the jury, Fields testified about his observations on the morning of April 20, 1967 (Tr. 64). He described the entry and emergence of a man into premises next door,

---

[2] Mrs. Coates was the owner of the 1959 Oldsmobile in which Fields had seen the men arrive and depart with the articles taken from McGruder's and Miss Pertiller's apartments.

the subsequent emergence of the two men carrying large items, their loading the items into a 1959 Oldsmobile on which he noted the license number (Tr. 64-65). He spoke of the child he saw playing in his yard and described the blanket which one of the men used to cover a television set (Tr. 68). He said he could identify only one of the two men he saw. He then identified appellant (Tr. 67.) He said he observed the man he identified as appellant from approximately 14 feet and that he stood at his window watching the offense from beginning to end (Tr. 84-85). He estimated that 15 minutes elapsed from the time the men arrived to the time they departed (Tr. 68). He related the description he gave the police as to height and weight (Tr. 70). When cross-examined as to how certain he was of his identification, Fields said: "I am positive but not certain" (Tr. 76). Later, when asked if he had some doubt about his identification, he replied, "No" (Tr. 78). And when the court asked him the same question, he again replied, "No" (Tr. 80). Appellant's counsel then sought to impeach Fields with his testimony given at the preliminary hearing reading the following excerpt from the transcript of that hearing (Tr. 80-81):

> Q Of the people you saw that occasion, do you see anyone meeting the description you gave the police in the courtroom now?
>
> A Yes, someone looked—their face—not the face, but height and size and hair, I saw part of his mustache. I didn't see the face completely but as near to that description as I have seen yet.
>
> Q But you are not 100% positive this is the man, is that correct?
>
> A No, because I never saw his face turned completely toward me, either aside or the back of him.

Offering an explanation for this testimony, Fields stated (Tr. 81):

> I said I was positive but I wasn't certain because of the fact that looking at someone through glass or even sometime you don't see all of the same picture,

I mean it may make the picture shape a little different.

Following Fields, the Government called Lillian Coates. On April 20, 1967, Mrs. Coates lived at 145 Tennessee Avenue, N.W. and there rented a room to appellant (Tr. 86). On that day her son, Reco, did not go to school, having torn his pants (Tr. 87-88). Some time in the early morning hours appellant came down from his room, observed Reco home and asked why he was not in school. Reco replied that he did not have any pants to wear. Appellant then offered to buy Reco pants and asked Mrs. Coates for the keys to her car. Mrs. Coates responded giving appellant the keys. Appellant in turn gave the keys to his girlfriend, Ida Watson. (Tr. 88-89.) Mrs. Coates described her car as a 1959 Oldsmobile. It was stipulated that its District license number was 241993, the number noted by Fields on the 1959 Oldsmobile he observed outside his premises the morning of the housebreaking (Tr. 65, 90). Mrs. Coates stated that Ida Watson drove as Miss Watson, appellant and Reco left some time after 9:00 a.m. (Tr. 91). Mrs. Coates testified that Reco returned later that day without a new pair of pants (Tr. 91).

Mrs. Coates recovered her car three or four days later at the 6th Precinct (Tr. 92). Several days after recovering her car, she found in the trunk the stereo that was taken from McGruder's apartment (Tr. 94).[3]

---

[3] Marshall Stafford, a neighbor to Mrs. Coates, corroborated Mrs. Coates' testimony on this point. He testified that on May 6, 1967, he borrowed Mrs. Coates' car and opened the trunk to see if the spare tire was there. In the trunk he found a radio and stereo. He identified Government's Exhibit 2 as the radio he found in Mrs. Coates' car (Tr. 106-107).

Corroborating the testimony of both Mrs. Coates and Marshall Stafford, Detective Gene J. Bovio testified that on May 7, 1967 he recovered a stereo and radio from the trunk of Mrs. Coates' car identifying Government's Exhibit 1 as the stereo and Government's Exhibit 2 as the radio (Tr. 108-109). Detective Bovio also testified that Mrs. Coates' car was abandoned in the vicinity of C and 11th Streets, S.E., and that it was impounded by the police on April 20, 1967 (Tr. 112-113).

Reco Coates testified next.[4] Reco corroborated his mother's testimony in which she related the circumstances under which she loaned appellant her car (Tr. 100). Referring to the morning of April 20, 1967, Reco testified that he, appellant, and another man rode in his mother's car, as a lady he did not identify drove (Tr. 101). The four of them drove to Iowa Avenue where they stopped. According to Reco's testimony, the man in the back seat left the car and entered a house on Iowa Avenue. Reco, a few minutes later, stepped out of the car and played nearby. He said he observed the man, who had left the back seat, return with a large article which was covered with "something". He testified that some time later he noticed what he described as a portable television and a record player in the back seat. (Tr. 101-102.)

After the Government rested and appellant's motion for judgment of acquittal was denied, the court heard argument on appellant's *Luck* motion. Upon being informed that appellant had been convicted of petit larceny in 1958 and of violating the Harrison Narcotics Act and the Jones-Miller Narcotics Act in 1960, the court ruled that appellant could testify free of impeachment by these prior convictions (Tr. 125-128).

Appellant testified that he borrowed Mrs. Coates' car on the morning of April 20, 1967, and left Mrs. Coates' rooming house with his girlfriend, Ida, at about 10:00 a.m. (Tr. 130-131). According to appellant, they drove to 8th and K Streets, S.E. where appellant went into the J & J Restaurant and had breakfast (Tr. 131). Appellant left the J & J with a friend named Steve at about 11:00 a.m. (Tr. 131). He then went to a pool room located at 8th and G Streets, S.E., which had not opened, and from there to a drug store on the corner of 8th and Eye Streets, S.E. (Tr. 132). He remained at the drug store for an unspecified time and returned to the pool room, leaving the pool room at about 2:00 p.m. (Tr. 132).

---

[4] He was eleven years of age at the time of trial and was found competent to testify by the court (Tr. 97).

From the pool room he went to Koon's Chinese Restaurant at the corner of 8th and K. He left Koon's at 4:00 p.m.

He described himself as 38 years old, 5'8" tall and 148 pounds. He denied that he was involved in the crimes charged in the indictment. (Tr. 134.)

On cross, appellant stated that after he left Mrs. Coates' house on the morning of April 20, 1967, he never returned (Tr. 138-139). He acknowledged that he was wearing a mustache on April 20, 1967 (Tr. 140).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 1801, provides:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, District of Columbia Code, Section 2201, provides:

> Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

Title 22, District of Columbia Code, Section 2202, provides:

> Whoever shall feloniously take and carry away any property of value of less than $100, including things

savoring of the realty, shall be fined not more than $200 or be imprisoned for not more than one year, or both. And in all convictions for larceny, either grand or petit, the trial justice may, in his sound discretion, order restitution to be made of the value of the money or property shown to have been stolen by the defendant and made way with or otherwise disposed of and not recovered.

SUMMARY OF ARGUMENT

I

Appellant contends that the procedure used when Fields identified appellant by photograph four days after the offense so tainted Fields' in-court identification that it denied him due process of law. We disagree. There is nothing in the record to suggest that Fields' in-court identification was artificially weighted by out-of-court identification procedures so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Fields had an excellent vantage point from which to observe the housebreaking. While Fields' in-court identification may have been less than certain due to his frank acknowledgement that his opportunity to observe was limited to a side view of the housebreaker's face, it was not artificially weighted by improper out-of-court procedures. In our view, neither *Stovall* nor *Simmons* were intended to exclude from the jury identification testimony properly weighted by the eyewitness' frank acknowledgement of the limitations surrounding his opportunity to observe the man he identifies as the offender.

II

Appellant contends that Fields' in-court identification is inadmissible because it was the product of Officer Humphrey's allegedly illegal entry into appellant's room. We find no support in the record for appellant's assertion that Officer Humphrey's entry into appellant's room led to Fields' subsequent photographic identification of ap-

pellant, which in turn led to Fields' in-court identification. In any event, appellant had abandoned his room in which Officer Humphrey made his entry. Appellant thus has no standing to assert his claim of illegality.

ARGUMENT

I. The District Court properly denied appellant's motion to suppress Fields' identification testimony on *Stovall* grounds.

(Tr. 30, 33, 34, 35, 39-40, 43, 53, 70, 76, 81, 84, 97, 134)

Appellant argues that the court erred in permitting Fields to identify him in court. He contends that the procedure used when Fields identified appellant by photograph four days after the offense so tainted Fields' in-court identification that it denied him due process of law.[5] We disagree.

The standard by which appellant's contention is to be tested is not disputed. "[E]ach case must be considered on its own facts. . . . [C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U.S. 377, 384 (1968).

The rule, although simply stated, is not easy in its application. It is designed to ensure "the reliability of the guilt determining process,"[6] yet it permits the use of what could be termed an unreliable in-court identification where the suggestive conditions surrounding the out-of-

---

[5] Appellant also contends that the procedures under which Fields identified him at the preliminary hearing tainted his in-court identification. Since Fields identified appellant by photograph before the preliminary hearing, we do not think Fields' identification at the preliminary hearing played a significant role in Fields' ability to identify appellant in court.

[6] *Crume* v. *Beto*, 383 F.2d 36, 38 n.9 (5th Cir. 1967).

court identification were justified under the circumstances (*Stovall* v. *Denno*, 388 U.S. 293 (1967)). The rule is not designed to keep from the jury identification testimony properly weighted. Rather, it is designed to exclude from the jury's consideration identification testimony artificially weighted through suggestive procedures employed out of court where, because of such suggestive procedures, there is a "very substantial likelihood of an irreparable misidentification." If suggestiveness plays no part in weighing the testimony of the eyewitness, the rule leaves it open to the jury to consider the identification in proper perspective along with other evidence in the case. In short, the rule does not keep from the jury all but positive identifications. Less than positive identifications which are not artificially weighted by out of court suggestive procedures are admissible; the eyewitness' qualifications are matters of weight, not admissibility.

We turn now to the circumstances surrounding Fields' out-of-court identification of appellant. Fields identified appellant as one of the men who entered the premises at 4608 Iowa Avenue on the morning the housebreaking occurred. He observed the man he identified as appellant from a distance of approximately 14 feet (Tr. 84). It was a bright, sunny day, and Fields' observations were made at 11:30 a.m. (Tr. 35). Although Fields acknowledged to the court that he observed the housebreaker for only 20 or 30 seconds,[7] he seemed to know he was observing a housebreaking in progress and astutely made accurate observations which led to appellant's apprehension. For example, he noted the make and license number of the car in which the housebreakers arrived and departed. He observed a young boy playing in his yard. He gave the police a description as to height, weight, age and clothes worn by the man he identified as appellant (Tr. 33, 43, 53, 70). To be sure, he said the housebreaker

[7] The distance from which Fields observed the housebreaking was brought out before the jury but the time during which Fields made his observation was brought out only before the court on the motion to suppress.

weighed between 175 and 180 pounds, and appellant weighed 148 pounds (Tr. 33, 70, 134). But this, we think, is mistake of judgment, not of identification.[8]

Four days after the offense Fields was asked to view three photographs. Two depicted men resembling each other (Tr. 34, 39). It is true that one man appeared to be ten years older then the other, but both men depicted in the photographs were Negro males of the same complexion, approximately the same size; both wore their hair cut close and both had a dark mustache (Tr. 39-40). Fields was able to differentiate between the two because their heads were not shaped similarly (Tr. 40).[9]

Fields informed the jury of the circumstances under which he observed the housebreaking. He said of his identification that he was "positive but not certain." (Tr. 76). He was confronted with his testimony given at the preliminary hearing in which he said he was able to identify appellant by height, size, and mustache. In that testimony, which was read to the jury, Fields acknowledged that he did not see the housebreaker's complete face and that he was not 100 per cent sure of his identification. And he subsequently explained that his view may have been somewhat distorted by the shape of the glass through which he was looking (Tr. 81).

Although there is some confusion in the record, we think it can be fairly said that Fields acknowledged that his view was not optimum but afforded him an opportunity to make a reasonably certain identification. There was, as appellant observes, some testimony which may have detracted from the reliability of Fields' in-court identification of appellant . But we do not think this testimony provides a basis for excluding Fields' in-court identification; on the contrary, we think it is a basis for admitting such testimony. It attests to the truthfulness

---

[8] For example, we note Fields estimated the age of the child whom he saw playing in his yard to be 6 or 7 (Tr. 30). Reco Coates was in fact 10 or 11 at the time (Tr. 97).

[9] We think it significant that Fields frankly acknowledged that he could not identify the second man and made no attempt to do so.

of Fields' identification testimony, accords it proper weight, and leaves it to the jury to consider its impact under the circumstances of the case. In our view, neither *Stovall* nor *Simmons* were intended to exclude from the jury's consideration testimony of the kind given by Fields.

II. Having abandoned the premises, appellant has no standing to question the legality of Officer Humphrey's entry into what was formerly his room. In any event, there is nothing to support appellant's assertion that Fields' in-court identification of appellant was the fruit of the Officer's entry.

Appellant contends that Fields' in-court identification is inadmissible as the fruit of the poisonous tree. He asserts that Officer Humphrey entered appellant's room unlawfully, that there he found a letter with the name Ida Watson on it, that this letter enabled Officer Humphrey to identify appellant by name which in turn allowed Humphrey to secure appellant's photograph and subsequently obtain Fields' identification. However, we find no support in the record to connect Officer Humphrey's entry into appellant's room with Fields' photographic identification of appellant. This is not a case in which the link between the alleged illegality and Fields' subsequent photographic identification had become so attenuated as to dissipate whatever taint, if any, there may have been. See *Smith (and Bowden)* v. *United States*, 117 U.S. App. D.C. 1, 324 F.2d 879 (1963), *cert. denied*, 377 U.S. 954 (1964); *Brown* v. *United States*, 126 U.S. App. D.C. 134, 137-138, 375 F.2d 310, 313-314 (1966), *cert. denied*, 388 U.S. 915 (1967). On this record, this is a case where there is no link between the alleged illegality and the witness' identification testimony.[10]

---

[10] We note that the prosecutor represented to the District Court that the names of appellant and his girl friend were known to Mrs. Coates and her son, Reco, and that the letter found in what was formerly appellant's room simply corroborated information Officer Humphrey obtained through other means.

In any event, appellant testified that after he left Mrs. Coates' house on the morning of April 20, 1967, he never returned (Tr. 138-139). He thus had abandoned the premises when Officer Humphrey entered and has no standing to assert his claim of illegality. See *Parman* v. *United States*, D.C. Cir. No. 20,506, decided May 20, 1968 (Slip op. 7-10); *Fequer* v. *United States*, 302 F.2d 214, 248-50 (8th Cir.), *cert. denied*, 371 U.S. 872 (1962).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
GEOFFREY M. ALPRIN,
JOEL M. FINKELSTEIN,
Assistant United States Attorneys.

MARY JO GROTENRATH,
Attorney, Department of Justice.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 312815 11

REPLY BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21769

Governor Lover

v.

United States of America

Appeal from the United States District Court for the District of Columbia

---

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 16 1968

Nathan J. Paulson
CLERK

Fred S. Gilbert, Jr.
Court-appointed counsel for
Appellant by the U. S. Court
of Appeals for the District of
Columbia Circuit
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

INDEX

TABLE OF CASES

In The

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21769

Governor Lover, Appellant

v.

United States of America, Appellee

Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF FOR APPELLANT

COUNTERSTATEMENT OF THE CASE

The Appellant adopts and refers the Court to the statement of the case appearing at pages 2 - 7 of his brief, filed herein on May 22, 1968.

SUMMARY OF ARGUMENT

I.

The identification procedures used were so impermissibly suggestive that Appellant was denied due process of law; and the District Court erred in denying the motion to suppress the in-court identification.

II.

The illegal entry and search of Appellant's room without a warrant violated the Fourth Amendment rights of the Appellant to be secure against unreasonable searches

and seizures. The subsequent in-court identification was a result of the exploitation of this illegal search.

III.

Abandonment is a matter of intent; and there is nothing in the facts of record to support the Appellee's contention that Appellant had abandoned his room when the search was made.

ARGUMENT

I. APPELLANT WAS DENIED DUE PROCESS OF LAW BY REASON OF THE PRETRIAL IDENTIFICATION PROCEDURES EMPLOYED. (Tr. Trans. pps. 28 - 63 inclusive)

The Appellee contends in footnote 5 on page 11 of its brief that it does not think Fields' identification at the preliminary hearing played a significant role in Fields' ability to identify Appellant in court. This assumption is logically unfounded.

The first identification was made through an impermissibly suggestive photographic procedure. In this identification Fields viewed the photographs of two men whom he was able to distinguish because their heads were shaped differently and one appeared to be at least 10 years older. Fields was able to draw obvious distinctions between the two pictures but, from the record, he did not distinguish between the two men he saw coming out of 4608 Iowa Avenue. He never testified that the second man he saw was 10 years older or had a differently shaped head. Because the two pictures shown to Fields were so perceptively different and because Fields never drew distinctions between the men he saw, in effect Fields was shown only one photograph in the identification procedure. Suggestibility is inherent in a procedure that is so limited in choice. After this initial choice and identification was made, the issue of identity for all practical purposes was determined.

Fields' subsequent viewing and identification of the Appellant at the preliminary hearing served to reinforce Fields' past identification and served as another basis for his subsequent in-court identification. The effect of this identification, at the preliminary hearing, cannot be discarded as insignificant as easily as the Government contends. Every identification made under any condition, suggestive or not, adds to the strength of the witness's final and decisive in-court identification when he points to the defendant in the presence of the jury. The impropriety of the identification procedure at the preliminary hearing has already been discussed in the Brief for Appellant (pp. 9 - 16) and will not be repeated here.

The impermissive photographic identification tainted the subsequent identification at the preliminary hearing, and, together, the procedures of both of these identifications tainted the in-court identification. The impermissible identification procedures cannot be disregarded. Appellant, again, urges that his motion to suppress Fields' in-court identification was improperly denied.

II. THE IN-COURT IDENTIFICATION WAS THE FRUIT OF THE ILLEGAL ENTRY AND SEARCH (Tr. Trans. 34, 39, 54, 56)

Fields' in-court identification was the fruit of Officer Humphrey's illegal entry and search. Appellee states in footnote 10 on page 14 of its brief that the prosecutor represented that the names of the Appellant and his girlfriend were known to Mrs Coates, Appellant's landlady, and her son, Reco. It is submitted that this is mere conjecture on the part of the prosecutor. The prosecutor was merely stating his opinion. His statement was not a part of testimony given under oath, and the Court is not even advised as to any facts upon which it might be based. Therefore, this

statement has no relevance and bears no weight in the consideration of the link between the illegal search and seizure and the witness's identification testimony.

The proper statement as to the knowledge of Mrs. Coates and Reco at the time of the entry and search is found on page 54 of the Trial Transcript. Officer Humphrey testified:

> After we responded to 145 Tennessee Avenue, the home of Mrs. Coates, she told us she loaned her car to her roomer and his girlfriend to carry her son to shopping to buy him some clothes. She stated she knew the roomer by the name of Governor. A little while after we questioned her son Reco. He came in and told us he had been with a lady who he knew as Miss Ida, referring to the defendant's girlfriend and Mr. Governor. These were the only names we had.

This statement was made under oath and is a proper part of the record.

This testimony shows that one purpose of the illegal entry was to discover the full names of Appellant and his girlfriend. The Appellee attempts to refute this fact by contending that there is no link between the illegal search and Fields' subsequent photographic identification. The record shows that a definite link exists. On the afternoon of the very day of the crime, the police went to the home of Mrs. Coates where they were confronted with the situation described above by Officer Humphrey. It is clear from Humphrey's testimony that the only names the police were able to obtain from Mrs. Coates and Reco were the first names - Governor and Ida. Finding themselves at this impasse, they proceeded to search the Appellant's locked room, at a time of day when he would not be expected to be at home. Humphrey testified that from this earch they discovered Ida's last name and, immediately thereafter, Appellant's full name and picture. He stated:

> We, with Mrs. Coates present, went in and there was a letter found lying on the bed had the name of Ida Watson on the letter and we got out a photograph and her photograph was identified and sent over by Lt. Smith. Detective Buvio brought it over to us. Mrs. Coates and Reco identified it. It wasn't too long after that before another picture was sent over by Lt. Smith and this picture was subsequently identified as the defendant Governor Lover. Tr. Trans. p. 55.

The links in this chain are apparent from the record. The letter which was found through the illegal search and seizure led to the discovery of full names, which led to the production of the photograph of Appellant used in Fields' photographic identification. For the reasons stated in Appellant's brief pages 16 - 20, the identification made as a result of the exploitation of the illegal search must be excluded.

III. THERE IS NO SUPPORT FOR THE ASSERTION THAT APPELLANT ABANDONED HIS ROOM (Tr. Trans. 55, 138, 139)

The Appellee in its brief (p. 15) argues that since the Appellant testified that he had never returned to his room, he had abandoned it when the search was made and, therefore, lacks standing to assert a claim of illegality. It is submitted that this premise and its conclusion are erroneous.

In order to establish abandonment, actual acts of relinquishment accompanied by intention to abandon must be shown. The question of abandonment is "an ultimate fact or conclusion based generally upon a combination of act and intent." Friedman v. United States, 347 F.2d 697, 704 (8th Cir. 1965), cert. denied, 382 U.S. 946 (1965). In State Mutual Life Assurance Co. v. Heine, 141 F.2d 741, 744 (6th Cir. 1944), the court, in discussing abandonment, stated:

> It had no application unless there is a total desertion by an owner without being pressed by necessity, duty

> or utility to himself, but simply because he no longer desires to possess the thing and willingly abandons it to whoever wishes to possess it.

The Trial Transcript, pages 138 - 139, relating to Appellant's testimony that he had never returned to Mrs. Coates' house cannot be treated as evidence of intent at the time to abandon and never return.

The illegal entry and search was made on the afternoon of the day of the crime. Appellant locked his room when he left for the day. He was not present at the time of the search, and it would hardly be expected that he would return before evening. His failure to be present or to have returned at the time of the search can hardly be construed as abandonment. In any event, the record is barren of any evidence that the police thought, or had any reason to think, that the Appellant had abandoned his room. Certainly, this was not stated as a basis for the illegal entry at the time. It was not even offered as justification for the entry, at the time of trial. The Appellee's assertion that the Appellant abandoned his room does not find support from the facts of record in this case.

The cases cited by the Appellee in support of the claim of abandonment are easily distinguishable from Appellant's situation. In Parman v. United States, D.C. Cir., No. 20,506, decided May 20, 1968 (Slip op. p. 8) the court upheld a finding of abandonment, but described the situation as follows:

> The finding of abandonment was premised on the fact that Appellant fled Washington almost immediately after the crime was committed and was in Ohio, registered under an assumed name at a tourist home, when the search occurred. He thereupon sold his car and appeared in Los Angeles where he also engaged an apartment under another assumed name through a lease which extended beyond the period of time for which the tenancy of his

> Washington apartment had been fixed. While in Los Angeles, Appellant sought a job and bought furniture and clothing.

In Appellant's situation there is no evidence that he fled the area, ever used an assumed name, or set up another residence. Appellant never returned his key, and at the time of the search Mrs. Coates, the owner, had not and could not have taken any steps to reclaim the premises.

In Feguer v. United States, 302 F.2d 214, 249 (8th Cir. 1962), cert. denied, 371 U.S. 872 (1962) the lower court's finding of abandonment was also sustained on facts distinguishable from the case here.

> In the case before us the evidence is uncontroverted that the items were seized only after the defendant had returned to the room, had gathered his desired belongings and had departed never to return. This departure effected a discard and abandonment of those items.

Here again, there is nothing in the record to show that Appellant removed any of his belongings from his room. Therefore, there is lacking any indication that Appellant had departed from his room with the intent never to return.

None of the elements indicating intent to abandon and none of the acts demonstrating actual abandonment are present from the facts in this record. Therefore, the Appellant submits that the claim of abandonment has no basis in fact, and that the search of his room, conducted by the police, constituted a violation of his Fourth Amendment right to be secure against unreasonable searches and seizures.

CONCLUSION

Therefore, for the foregoing reasons, it is respectfully submitted that this court should reverse the verdict of the trial court below or, in the alternative, remand

the case for a new trial with instructions to exclude the in-court identification by the witness Charles Pernell Fields, all evidence relating to the pretrial identification, and all evidence obtained as a result of the illegal search of the Appellant's room.

Respectfully submitted,

Fred S. Gilbert, Jr.
Court appointed counsel
for Appellant
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

July 16, 1968

CERTIFICATE OF SERVICE

I, Fred S. Gilbert, Jr., hereby certify that the foregoing "Reply Brief for Appellant" was served this 16th day of July, 1968, by mailing true copies thereof, postage prepaid, to the United States Attorney, United States Courthouse, Washington, D.C. 20001.

_____

Fred S. Gilbert, Jr.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 28 1969

Nathan J. Paulson
CLERK

GOVERNOR LOVER,
Appellant,

v.

UNITED STATES,
Appellee

Case No. 21769

PETITION OF APPELLANT FOR REHEARING

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, appellant, through counsel, respectfully petitions this Court for a rehearing in the above cause on the question of whether it was error for the trial court to permit the introduction of testimony of the in-court identification of appellant by witness Clarence Fields, subsequent to certain pre-trial indentification procedures employed by the police. In support of this petition, appellant submits the following:

1. On February 28, 1969, appellant submitted his Memorandum Subsequent to Remand Proceeding to this Court.

2. On April 1, 1969, the United States Supreme Court decided the case of Foster v. California, ___U. S. ___ (No. 47-October Term, 1968), and considered substantially the same issues as are found in appellant's case. Appellant has attached a certified copy of the Foster opinion to the original of this petition for rehearing.

3. In Foster v. California, supra, p. 3 (slip opinion), the Supreme Court condemned a three-man lineup in which the defendant had markedly different physical characteristics from the other two individuals in the lineup. This was similar to appellant's case in that appellant's picture was identified from a group of three photographs, two of which were of males of markedly different ages and head shapes, the third being of a female.

4. Subsequent to the three-man lineup in Foster v. California, supra, Foster was subjected to a one-man confrontation and thereafter to a five-man lineup. The total identification process was condemned by the Court as being a violation of due process. Appellant's case is parallel. He was identified at his presentment, in the absence of a lineup, subsequent to the three-picture photographic identification. The following statement in Justice Fortas' opinion in Foster, supra, at p. 3, (slip opinion) applies with equal weight to the situation of appellant:

> "The suggestive elements in this identification procedure made it all but inevitable that David would identify petitioner whether or not he was in fact 'the man.' In effect, the police repeatedly said to the witness, 'This is the man.' See Biggers v. Tennessee, 390 U.S. 404, 407 (dissenting opinion). This procedure so undermined the reliability of the eyewitness identification as to violate due process." (Emphasis in original)

WHEREFORE, appellant respectfully submits that the newly rendered Foster decision justifies the granting of this petition for a rehearing and that this Court should reverse the verdict of the trial court below or, in the alternative, remand the case for a new trial with instructions to exclude the in-court identification by witness Fields and all evidence relating to Fields' pre-trial identifications.

Respectfully submitted,

Fred S. Gilbert, Jr.

Court Appointed Counsel for
Appellant by the U.S. Court of Appeals
for the District of Columbia Circuit
1001 Connecticut Avenue, N.W.
Washington, D. C.

CERTIFICATE OF SERVICE

This is to certify that I have this 28th day of April, 1969, sent a copy of Petition of Appellant for Rehearing by first class mail, postage prepaid, to counsel of record in this cause:

United States Attorney
United States Courthouse
Washington, D. C. 20001

Fred S. Gilbert, Jr.